

119 FERC ¶ 61,120
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Public Utility District No. 1 of Snohomish County,
Washington

Project Nos. 12688-001,
12689-001, 12690-001,
12691-001, 12692-001,
12698-001 and 12687-001

ORDER DENYING REHEARING

(Issued May 4, 2007)

1. On February 22 and March 9, 2007, Commission staff issued to Public Utility District No. 1 of Snohomish County, Washington (the District), seven preliminary permits to study the feasibility of developing seven proposed tidal power projects to be located in passages and inlets in Puget Sound, the San Juan Islands, and the Strait of Juan de Fuca, in Kitsap, San Juan, Skagit, and Island Counties, Washington.¹ On March 23, 2007, the Tulalip Tribe (the Tribe) filed a timely request for rehearing in the proceedings.

2. The Tribe argues that the permits should specifically state that the District must file a development application before installing and testing any pilot generators and related equipment in the Tribes' usual and accustomed fishing areas. The Tribe is concerned that, without this provision, as the permits near the end of their terms, the District will request that the Commission find that its "experimental" in-water testing of the generators is not required to be licensed without consulting the Tribe. The Tribe cites to *Verdant Power, LLC*,² where the Commission found that, under the facts of that case, the short-term testing of experimental technology did not require licensing under the Federal Power Act.

¹ 118 FERC ¶¶ 62,141 through 62,145; 62,159; and 62,188 (2007).

² 111 FERC ¶ 61,024 (2005).

3. In the permit proceeding, Commission staff responded to concerns expressed by the U.S. Department of the Interior about the possible installation of test units by correctly stating that:

a preliminary permit does not authorize a permittee to undertake any construction or to enter onto lands owned by others. Therefore, Interior's impression that the Commission might allow the placement of test units under the preliminary permit is misplaced. Placement of test units is not authorized by the issuance of a permit pursuant to the FPA³]

Thus, it is clear that the District cannot rely upon its preliminary permits to construct any testing facilities.

4. If the District is convinced that it meets the criteria set forth in *Verdant*, and that its testing activities are therefore not required to be licensed, it is possible that it might elect to proceed with testing without further order from the Commission. We note, however, that the District, or any other similarly-situated entity, would be well-advised, before beginning testing or other ground-disturbing activities, to seek an affirmative declaration from the Commission that its proposed actions indeed do not require licensing. In the absence of such a declaration, the entity would be at risk of our later determining that its activities did require a license, and that it consequently had violated the Federal Power Act. Moreover, in the absence of a Commission declaration, it may be difficult for any entity to obtain necessary approvals from federal, state, and local entities, or to obtain financing. Here, given that the District has made no current proposal to engage in testing, the Tribe's request that we reach a conclusion about the requirements attendant on such activity is premature. In any case, even if the District were to seek, and obtain, confirmation that it could conduct limited testing without a license, it would nonetheless be obligated to comply fully with all applicable federal, tribal, state, and local laws and regulations, including those relating to environmental protection.⁴

³ See 118 FERC ¶ 62,141 at p. 64,399.

⁴ See 111 FERC ¶ 61,024 at P 10.

The Commission orders:

The request for rehearing filed in this proceeding on March 23, 2007, by the Tulalip Tribe is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.